

May 16, 2016

Ms. Kathryn Roberts  
New Mexico Environment Department  
Post Office Box 5469  
Santa Fe, New Mexico 87502

*Via email to [kathryn.roberts@state.nm.us](mailto:kathryn.roberts@state.nm.us)*

Dear Ms. Roberts,

Please consider these preliminary comments from Nuclear Watch New Mexico on the proposed 2016 Consent Order for review Tuesday May 18 at the Northern New Mexico Citizens' Advisory Board Meeting. We will submit additional comments by May 31, 2016.

Thank you for extending the comment period. It was needed.

We urge the New Mexico Environment Department (NMED) to abandon the proposed 2016 Compliance Order on Consent, or Consent Order, for Los Alamos National Laboratory (LANL), released for public comment on March 30, 2016. It creates serious problems and represents a giant step backwards in achieving the goal of genuine cleanup of the Laboratory.

The Environment Department should keep the existing Consent Order that went into effect March 1, 2005, while modifying and updating a cleanup schedule that includes a realistic final compliance date. I also formally request that NMED provide the opportunity for a public hearing on the revised cleanup schedule and new completion date, in accordance with the New Mexico Hazardous Waste Act and the 2005 Consent Order.

#### GENERAL COMMENTS

##### **The opportunity for a public hearing must be provided**

- Any extension of a final compliance date must be treated as a Class 3 permit modification to the 2005 Consent Order and therefore requires a 60-day public comment period.
- Any extension of a final compliance date under the 2005 Consent Order can be implemented only after the opportunity for public comment and a public hearing, including formal testimony and cross-examination of witnesses.
- The Environment Department is legally required to follow these public participation requirements that explicitly incorporated into the 2005 Consent Order.

**Withdraw the proposed draft 2016 Consent Order**

- The proposed draft represents a big step backwards in achieving the goal of genuine cleanup of the Laboratory.
- The Environment Department should keep the current 2005 Consent Order and revise the Section XII cleanup schedule and final compliance date.
- I request that the Environment Department withdraw the proposed draft 2016 Consent Order.

**The public deserves the opportunity to comment on all following drafts**

- It seems likely that a later draft – after the Lab’s and public comments are incorporated into a revised draft – and after closed-door negotiations between the Environment Department and the Laboratory – could be substantially different from the current draft.
- I request that the public have the opportunity to review and comment on any further drafts of a revised proposed 2016 Consent Order.

**Public participation provisions in the existing 2005 Consent Order must be incorporated into the proposed draft 2016 Consent Order**

- The proposed draft 2016 Consent Order explicitly limits public participation requirements incorporated into the existing 2005 Consent Order.
- I request that all notices, milestones, targets, annual negotiations, and modifications require public review and comment, and the opportunity for a public hearing.

**The current state of cleanup must be updated and next steps scheduled**

- Work under the existing 2005 Consent Order needs to be subject to public review. In 2005 DOE agreed to complete cleanup under the Consent Order by December 6, 2015, which did not happen. In order for the public to understand where the work under the existing Consent Order stands, LANL should be required to provide a current, publicly available list of the status of all cleanup projects under the 2005 Consent Order.
- Further, I request that next steps for cleanup at every site listed in the 2005 Consent Order be documented in detail and given a scheduled completion date, or alternatively verified as already completed.
- All documents submitted under the 2005 Consent Order must be incorporated into any revised Consent Order.

**All documents must be made public as required in the 2005 Consent Order**

- The State and the Lab must make all communications, documents, submittals, approvals, notices of deficiencies and denials under any revised Consent Order readily and electronically available to the public.
- The State and the Lab must notify individuals by e-mail of all submittals, as required in the 2005 Consent Order.

**The Environment Department must respond in writing to all public comments**

- I request that the State reply individually to each and every comment submitted.
- The Lab's comments and NMED's response to comments must be made public.

**All future work must have enforceable deadlines**

- The proposed draft 2016 Consent Order proposes a "Campaign" approach with enforceable cleanup deadlines limited to the work scheduled only for that year.
- I request that all anticipated cleanup projects have scheduled, enforceable cleanup deadlines from the beginning of any revised Consent Order.

**The Consent Order cannot be open-ended**

- Any Consent Order for LANL cleanup must have a final compliance date to which the State and the Lab agree to and are so bound.
- The public should be given an opportunity for a public hearing on the new final compliance date as required by New Mexico's hazardous waste regulations.

**SPECIFIC COMMENTS**

**The Proposed 2016 Consent Order Must Not Extend the Original Final Compliance Date Without Required Public Participation**

The proposed 2016 consent order would indefinitely extend the final compliance date for completing corrective action at the Laboratory, without the opportunity for a public hearing with formal testimony and cross-examination of witnesses. Any extension of a final compliance date under the 2005 Consent Order requires a 60-day public comment period and the opportunity for a public hearing, including formal testimony and cross-examination. The Environment Department is legally required to follow these procedural requirements.

The legal requirements that mandate a public hearing are clear. Section XII of the 2005 Consent Order establishes the compliance schedule for implementation and completion of corrective actions at specific sites at the Laboratory. This schedule is mandatory. The final report that was to be submitted under the 2005 Consent Order – therefore, the final compliance date – was the remedy completion report for the huge Area G waste dump, required to be submitted by December 6, 2015. The proposed 2016 Consent Order would indefinitely extend this final compliance date by not designating a specific final compliance date.

But this revision must be treated as a major Class 3 permit modification. Section III.W.5 of the 2005 Consent Order explicitly provides for the preservation of full procedural rights for the public as follows:

This Consent Order hereby incorporates all rights, procedures and other protections afforded the Respondents [DOE and UC, now LANS] and the public pursuant to the regulations at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42) and 20.4.1.901 NMAC, including, but not limited to, opportunities for public participation, including

public notice and comment, administrative hearings, and judicial appeals concerning, for example, remedy selection decisions of the [Environment] Department.

Thus, extension of a final compliance date under the 2005 Consent Order requires a 60-day public comment period and the opportunity for a public hearing, including formal testimony and cross-examination.

### **The Proposed New Consent Order Must Not Limit Other Public Participation Procedures**

The proposed 2016 Consent Order expressly limits public participation requirements in a way that completely diverges from those provided in the 2005 Consent Order. As explained above, the 2005 Consent Order explicitly protects procedural due process rights available to the public. The proposed 2016 Consent Order explicitly removes these protections, as follows:

The Parties agree that the rights, procedures and other protections set forth at 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42), 20.4.1.901 NMAC, and 20.4.1.902 NMAC, including, but not limited to, opportunities for public participation, including public notice and comment, administrative hearings, and judicial appeals, ***do not apply*** to modification of the Consent Order itself. ***[Emphasis added]***

Thus, as proposed in the above language, the Parties (the Environment Department, Department of Energy and Los Alamos National Security, LLC) have inappropriately agreed to remove the due process rights, procedures and other protections provided to the public under the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act. This provision must be stripped from the proposed 2016 Consent Order.

### **The Proposed New Consent Order Must Not Eliminate Enforceable Deadlines**

The proposed 2016 consent order would eliminate all the deadlines for completing cleanup under the 2005 Consent Order, and replace them with an open-ended and vague scheduling process, with limited enforcement opportunities.

The 2005 Consent Order, in Section XII, established dozens of deadlines for the completion of corrective action tasks, including completion of investigations at individual sites, installation of groundwater monitoring wells, submittal of groundwater monitoring reports, evaluation of remedial alternatives for individual sites, and completion of final remedies. These deadlines are enforceable under section III.G.

The proposed 2016 Consent Order would abandon the 2005 Consent Order provisions and replace them with a so-called “Campaign Approach” under Section VIII. Under Section VIII.A.3, it would be up to the DOE, not the regulator at the New Mexico Environment Department, to select the timing and scope of each “campaign.”

Enforceable deadlines for cleanup tasks would apply no more than one year into the future. Deadlines would be based on “Campaigns” negotiated each year with DOE with no public participation and opportunity to comment on the schedule. To add insult to injury, the annual schedule would be determined by funding at DOE’s discretion, rather

than the schedule driving the funding, which was the fundamental approach of the 2005 Consent Order.

All cleanup projects must mandatory completion dates scheduled from the beginning date of any revised Consent Order, and must be fully enforceable.

### **Existing Violations Must Not Be Eliminated**

Section II.A of the proposed 2016 Consent Order would “settle any outstanding violations of the 2005 Consent Order.” This is a get out of jail free card. Without enforceable schedules from the beginning, any consent order is not truly unenforceable, and the Environment Department would be abdicating its responsibility to protect human health and the environment as required by the federal Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act. NMED must not surrender its regulatory and enforcement powers!

### **Attorney General Approval Must Be Obtained**

The 2005 Consent Order was signed by the Attorney General of New Mexico for purposes of the Covenant Not to Sue (section III.) and the Reservation of Rights (section III.). As indicated on the draft signature page, there is no indication of the NM Attorney General plans to sign the proposed 2016 Consent Order. Yet it would provide the State of New Mexico with a covenant not to sue DOE on behalf of the State of New Mexico, not merely on behalf of the Environment Department. The Attorney General was an active participant, representing the People of New Mexico, in the 2005 Consent Order. The Environment Department has a responsibility to ensure that the NM Attorney General is consulted, and his approval obtained, before any consent order is adopted.

### **The Proposed 2016 Consent Order Must Not Omit Detailed Requirements Found in the 2005 Consent Order**

The 2005 Consent Order includes numerous detailed requirements for such things as well installation, sample collection, and preparation of work plans and reports. These ensure that the cleanup work is done properly, consistently, and according to standard industry practices. They also ensured that work plans and reports were consistent, easy for the Environment Department to review, and easy for the public to understand. The proposed 2016 Consent Order omits many such requirements, which should be corrected.

### **The Proposed 2016 Consent Order Must Not Allow Budget To Dictate Cleanup**

The proposed 2016 Consent Order allows DOE to provide cleanup priorities based on anticipated budget, which is backwards. . By the time NMED receives an estimated annual cleanup budget from DOE, the horse has left the barn. The original purpose of the 2005 Consent Order was to compel DOE and LANL to ask Congress for additional funds to accelerate cleanup. The giant loophole in the proposed 2016 Consent Order that allows DOE and LANL to say that they don’t have sufficient funding and therefore can choose to exempt themselves from cleanup should be eliminated.

### **Cleanup Levels Must Remain Strict**

Section IX Cleanup Objectives and Cleanup Levels of the proposed 2016 Consent Order would allow DOE to “develop site specific ecological cleanup levels” to mitigate

unacceptable ecological risk due to release of site-related contaminants. There is no mention of NMED's role in this process. DOE would be allowed to demonstrate to NMED that any particular "cleanup objective is impracticable." To do this, DOE may consider such things as technical difficulty, the cost of the project, hazards to workers or to the public, and any other basis that may support a finding of impracticability. If NMED approves the impracticability request, DOE can then propose alternative cleanup methods using site-specific risk assessments. All of this could take place behind closed doors, as there are no public participation requirements in this section. Please clarify what cleanup levels will be used and when and where they will be applied.

### **New Mexico deserves better**

In closing, the Environment Department's proposed 2016 Consent Order allows the federal government to leave Northern New Mexico contaminated if DOE believes that cleanup is too difficult or costly— a sorry situation indeed for a nuclear weapons facility that receives over 2 billion taxpayer dollars a year. Instead, the New Mexico Environment Department should implement a new revised Consent Order that is aggressive and enforceable and in which the State of New Mexico stays in the driver's seat, not LANL and DOE.

Sincerely,  
Nuclear Watch New Mexico  
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[www.nukewatch.org](http://www.nukewatch.org)

The new draft Consent Order is available at  
<https://www.env.nm.gov/HWB/lanlperm.html#COOC>

NMED's public notice for the draft Consent Order is available at  
[https://www.env.nm.gov/HWB/documents/PublicNotice\\_\\_English.pdf](https://www.env.nm.gov/HWB/documents/PublicNotice__English.pdf)

The public comment period ends 5:00 pm May 31, 2016.  
Comments should be submitted to [kathryn.roberts@state.nm.us](mailto:kathryn.roberts@state.nm.us)